

A Guide to the Mediation Process

Department of Education,
Special Education Programs
Office of Educational Services and Support
2007

INTRODUCTION

Conflict is often inevitable, but it need not produce negative results. If the parent and school personnel are unable to resolve a conflict concerning a student with a disability, then mediation is an available option to possibly avoid a long and expensive due process hearing.

The mediator is a neutral third party and, therefore, has no power to make a decision regarding the conflict. The mediator will listen to the views of each party and will guide them in developing an acceptable solution to the problem. The mediator has been trained to handle special education disputes.

Mediation is completely voluntary. It will not interfere with any procedural safeguards, including a request for a due process hearing.

This manual will familiarize you with the mediation process and what will occur when you go into a mediation conference.

If you have any questions after reviewing these materials, please do not hesitate to contact the school district administrator or Special Education Programs (SEP) at 605-773-3678.

MEDIATION IN SPECIAL EDUCATION

Mediation in special education is a process to assist parents and schools in resolving disagreements regarding a student's special education program.

A trained mediator works with both parties to guide them toward a mutually satisfactory solution in the best interest of the student. This occurs at a non-adversarial meeting which is more structured than a parent-school conference, but less formal than due process hearings.

Mediation is a **voluntary** process. It is **optional** for both parties. The mediation process is confidential and encourages open communication in an effort to avoid a hearing or state complaint.

THE COST OF SPECIAL EDUCATION MEDIATION

Special education mediation is provided at no cost to the parents or school district. Parties who choose to involve their attorneys in the mediation are responsible for their own attorney fees. Any incidental costs are the school's responsibility. The ultimate responsibility for the administration of the special education mediation process is with the Office of Educational Services and Support, Special Education Programs. The office will ensure that all mediators are trained and receive appropriate follow-up training.

ADVANTAGES OF MEDIATION

The purpose of mediation is to provide a **voluntary alternative** to a due process hearing or state complaint and provide a means to resolve disagreements between parents and school district personnel. In virtually all cases, mediation is less costly and less adversarial than a due process hearing. Mediation helps both parties let go of the past, and focus on what is best for the student in the future.

Mediation can:

- Identify disagreements concerning the identification, evaluation, or educational placement of a student;
- Clarify the issues causing the disagreement;
- Provide those involved with uninterrupted opportunities to present their points of view;
- Stimulate mutual problem solving efforts;
- Promote positive working relationships between parents and school personnel; and
- Help parents and school personnel focus on what they have in common -- the student -- rather than on the issues which divide them.

REQUESTING MEDIATION

Parent(s) or the school representative contacts the South Dakota Department of Education, SEP to request mediation. A request for mediation brochure can be found at <http://doe.sd.gov/oess/specialed/complaint/index.asp>

AGREEING TO MEDIATE

Mediation is voluntary for both parties. Unless both parties agree to mediation as a way to resolve their disagreement, a mediation conference cannot be scheduled. Once the parents and school district agree to mediation, Special Education Programs appoints a mediator.

APPOINTMENT OF A MEDIATOR

Once a mediator is appointed, Special Education Programs or the mediator will set a mutually convenient date, time and location for the conference and determine who will participate. At that time, Special Education Programs will answer any questions about the process and in turn, may request additional information from the parties.

MEDIATORS

Individuals selected to serve as mediators have successfully completed a training program specifically designed for special education mediators. In addition to the initial training, mediators will participate in regularly scheduled inservice sessions to assure updating of appropriate information and skills.

Mediators are selected on the basis of these qualifications:

- neutrality, both real and perceived;
- knowledge of special education;

- knowledge of the process of mediation; and
- appropriate personal communication skills.

A mediator is encouraged to join with other mediators and members of related professions to promote mutual professional development.

THE ROLE OF THE MEDIATOR

The mediator is a **neutral** third party acting as a **facilitator** to assist parents and school personnel in reaching an agreement.

Although the mediator is in control of the conference, he/she does not make the decision on how to resolve the issue(s). The mediation process allows parties to present their positions and attempts to achieve mutual understanding and solution to the problem in the best interest of the student. The mediator facilitates the process. He or she summarizes positions and helps the parties consider possible alternatives.

THE ROLE OF PARENTS AND THE SCHOOL DISTRICT

The parties are expected to mediate in good faith and with the intention of reaching an agreement. They will be active participants in the conference and, if mediation is successful, the mediator will assist in the development of an agreement.

THE ROLE OF LEGAL COUNSEL

The parties understand that mediation is not a substitute for independent legal advice. The parties may secure independent legal advice throughout the mediation process. The parties are responsible for their own legal fees.

PREPARING FOR A MEDIATION CONFERENCE

Each of the parties is encouraged to:

- Put aside personality conflicts and focus on the student's best interest.
- Keep your schedule open through day and evening to help ensure adequate time for mediation.
- Familiarize self with regulations pertinent to your issues.
- Review all relevant documents, paper, and reports prior to the conference.
- Organize your information and any materials before the mediation conference.
- Think of possible alternatives/ways of solving the problem.
- Think about what you want to get out of the conference.
- Think about what you want the other party to do.
- Think about what you are willing to do.
- Be willing to listen and compromise.

PARTICIPANTS IN THE MEDIATION CONFERENCE

The number of participants at each mediation conference will be kept to an absolute minimum in order to enhance the potential for effective problem solving.

At the conference, the parties to the dispute -- the parent(s) and the school district's representative(s) -- must have the authority to make decisions and to commit any resources agreed upon as the result of the mediation.

The mediator makes the final decision on who will attend the mediation conference. No participants will be admitted without prior knowledge or consent.

THE LENGTH OF MEDIATION

Mediation conferences could take up to a full day. Generally, however, they can be completed in three to four hours, depending upon the complexity of the issue(s). It is recommended that participants plan to set aside a full day, even though the session is likely to conclude in a shorter period of time.

THE MEDIATION CONFERENCE

The mediation conference consists of several phases:

INTRODUCTION. The mediator begins the conference promptly and explains the mediation process and the ground rules of the conference to all participants.

JOINT SESSION. Both parties to the dispute are given an opportunity **without interruption** to present the issue(s) from their point of view. Only the mediator may ask questions or summarize what has been said.

CAUCUS. The mediator may use the caucus, which is an opportunity for each party to meet privately with the mediator, to further clarify issues and positions. The mediator will not share information from the caucus without the party's consent. There may be several caucus sessions.

AGREEMENT. When the parties reach an agreement, the mediator assists in explaining solutions to the problem. The parties determine the terms of the agreement and the mediator puts the agreement in writing. The resulting agreement is signed by both parties and the mediator. At the conclusion of the mediation, each party receives a duplicated original. If mediation results in an agreement which would require changes to

a student's IEP, an IEP committee should be convened as soon as possible to consider the incorporation of elements of the agreement into the student's IEP.

Not all mediation conferences result in agreements. If agreement is not reached, the mediator will certify to the parties, in writing, that the mediation has been unsuccessful.

The discussion during mediation is **confidential** and there will be **no disclosure of any information given by either party**. At conclusion of the conference, and in the presence of the parties, the mediator may destroy any notes he/she has taken. The only part of the mediation that may be shared with other persons is the written agreement.

The mediator will be excluded from participation in subsequent proceedings -- staffing, complaint investigations, and due process hearings. Nothing occurring at mediation is admissible as evidence in a due process hearing. The written agreement may be admissible in subsequent proceedings.

No electronic recording of the mediation conferences will be allowed and no records of the proceeding will be kept other than the written agreement.

CONCLUSION

The purpose of mediation in special education is to provide an alternative to a due process hearing or a state complaint as a way to resolve conflicts, clarify issues and stimulate mutual problem-solving efforts between parents and school personnel. Even if an agreement is not reached, there is the potential of both parties leaving the session with an enhanced perspective of the issues and with the focus on the student. Most mediations result in better communication between the school and parents. This leads to an improved education for the student.

SOUTH DAKOTA SPECIAL EDUCATION STANDARDS OF MEDIATION

Mediation is a conflict resolution process in which an impartial third party facilitates participants negotiating a voluntary agreement. In mediation, whether private or public, voluntary or mandatory, decision-making authority rests at all times with the parties. These standards are intended to assist and guide special education mediation in South Dakota.

Mediators have duties to the parties, to their profession, and to themselves. They will be honest and unbiased, act in good faith, be diligent, and never seek to advance their own interests at the expense of the parties.

Mediators must act fairly in dealing with mediation participants, have no personal interest in the terms of any settlement agreement, have no bias toward individuals or institutions involved in mediation, be reasonably available as requested by mediating parties, and be certain that the parties are informed about the mediation process in which they are involved.

IMPARTIALITY

The mediator must maintain impartiality toward all parties. Impartiality means freedom from favoritism or bias either by word or by action, and a commitment to serve all mediation participants as opposed to a single party. The mediator should disclose to the participants any affiliations which the mediator may have with any participant and obtain all parties' consent to proceed as mediator.

CONFIDENTIALITY

Maintaining confidentiality is critical to the integrity of the mediation process. Confidentiality encourages candor, a full exploration of the issues, and the possibilities of settlement. The mediator will resist testifying, and disclosing other information about the substance of mediation at any proceeding without the consent of all mediation parties.

SUSPENSION OR TERMINATION OF MEDIATION

The mediator will inform the participants of their rights to withdraw from mediation at any time and for any reason. If the parties reach a final impasse, the mediator will not prolong unproductive discussions.

COMPARISON TO OTHER PROCESSES

The mediator will explain that mediation is not arbitration, a legal proceeding or therapy, and that the mediator will not decide any issues for the parties.

INDEPENDENT ADVICE AND INFORMATION

The parties understand that mediation is an agreement-reaching process in which the mediator assists parties to reach agreement in a collaborative and informed manner. It is understood that the mediator has no power to decide disputed issues for the parties. The parties understand that mediation is not a substitute for independent legal advice. The parties are encouraged to secure such advice throughout the mediation process and are strongly advised to obtain independent legal review of any formal mediated agreement before signing that agreement. The parties understand that the mediator has an obligation to work on behalf of all parties and that the mediator cannot render individual legal advice to any party and will not render therapy or arbitrate within the mediation.

OPPORTUNITY FOR FULL EXPRESSION OF INTERESTS

The mediator shall seek to provide each mediation participant with a full opportunity to effectively express his or her interests.

**ADMINISTRATIVE RULES OF SOUTH DAKOTA
DEPARTMENT OF EDUCATION
SPECIAL EDUCATION**

24:05:30:09. Mediation. Each school district shall ensure that procedures are established and implemented to allow parties to disputes involving any matter under this article, including matters arising before the filing of a due process complaint, to resolve disputes through a mediation process. Procedures for mediation are as follows:

(1) The district shall ensure that mediation is viewed as voluntary and freely agreed to by both parties and is in no way used to deny or delay an aggrieved party's right to a hearing on a parent's due process complaint, or to deny any other rights afforded under this article; and

(2) The mediation conference is an intervening, informal process conducted in a nonadversarial atmosphere that is scheduled in a timely manner and held in a location that is convenient to the parties in the dispute.

The state shall bear the cost of the mediation process, including the costs of meetings described in § 24:05:30:09.02.

Source: 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:09.01. Mediator -- Qualified and impartial. The mediation process shall be conducted by a qualified and impartial mediator who is trained in effective mediation techniques. The department shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services. Mediators shall be selected on a random, rotational, or other impartial basis. An individual who serves as a mediator:

(1) May not be an employee of:

(a) Any school district or state agency that is involved in the education or care of the child; or

(b) The department, if the department is providing direct services to a child who is the subject of the mediation process; and

(2) May not have a personal or professional interest that conflicts with the person's objectivity.

A person who otherwise qualifies as a mediator is not an employee of a district or state agency solely because the person is paid by the department to serve as a mediator.

Source: 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:09.02. Meeting to encourage mediation. A school district may establish procedures to offer to parents and schools who elect not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party:

(1) Who is under contract with a parent training and information center or community parent resource center in the state, or an appropriate alternative dispute resolution entity; and

(2) Who would explain the benefits of the mediation process and encourage the parents to use the process.

Source: 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:09.03. Mediation agreement. If the parties resolve a dispute through the mediation process, the parties shall execute a legally binding agreement that sets forth that resolution and that:

(1) States that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any federal court or state court; and

(2) Is signed by both the parent and a representative of the district who has the authority to bind the district.

A written signed mediation agreement under this section is enforceable in any state court of competent jurisdiction or in a district court of the United States.

Source: 33 SDR 236, effective July 5, 2007.

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

MEDIATION AGREEMENT

DATE: _____

In the Matter of Mediation Between:

COMPLAINANT: _____

RESPONDENT: _____

MEDIATION ISSUE(S): _____

AGREEMENT

We, the undersigned, having participated in a mediation session and being satisfied that the provisions of the resolution of the dispute are fair and reasonable, hereby agree to abide by and fulfill the following terms:

Through mediation a satisfactory resolution has been attained regarding the identified issues and both parties agree to the dismissal of the due process hearing proceedings.

Parent/Guardian

School District Representative

Mediator

MEDIATION UNSUCCESSFUL

DATE: _____

COMPLAINANT: _____

RESPONDENT: _____

MEDIATION ISSUE(S): _____

Mediation has concluded and a mutual agreement **cannot be attained** among the parties. Both parties agree the issues to be pursued through due process are as follows:

Complainant

Respondent

Mediator

cc: File
Due Process Hearing Officer

**MEDIATION SURVEY
PARENT EVALUATION FORM**

1. Parent _____
Address _____ Telephone _____
2. Summary of issue mediated _____

3. How did you find out about mediation? _____
4. What made you decide to try mediation? _____
5. Was the mediation successful? Yes No
6. What was the most positive aspect of the session? _____

The most negative? _____

7. How would you have improved the session? _____

8. How would you rate the mediator? Good _____ Average _____ Outstanding _____
9. Did you reach an agreement at the session? Yes No
If yes, how helpful was the mediator in assisting you in reaching the agreement? _____

10. Did you consult any attorney before, during, or after the mediation process ? Yes No
11. Do you feel that the mediator sufficiently explained the mediation process? Yes No
12. Do you feel mediation has improved communication with the school? Yes No
13. Would you recommend the process to others involved in special education disputes? Yes No

The purpose of this survey is to improve mediation service. Information is maintained in a confidential manner. Thank you for completing this form. Please mail to:

**Special Education Programs
700 Governors Drive
Pierre, South Dakota 57501-2291**

**MEDIATION SURVEY
SCHOOL DISTRICT EVALUATION FORM**

1. Parent _____
Address _____ Telephone _____
2. Summary of issue mediated _____

3. How did you find out about mediation? _____
4. What made you decide to try mediation? _____
5. Was the mediation successful? Yes No
6. What was the most positive aspect of the session? _____

The most negative? _____

7. How would you have improved the session? _____
8. How would you rate the mediator? Good _____ Average _____ Outstanding _____
9. Did you reach an agreement at the session? Yes No
If yes, how helpful was the mediator in assisting you in reaching the agreement? _____

10. Did you consult any attorney before, during, or after the mediation process ? Yes No
11. Do you feel that the mediator sufficiently explained the mediation process? Yes No
12. Do you feel mediation has improved communication with the parent? Yes No
13. Would you recommend the process to others involved in special education disputes? Yes No

The purpose of this survey is to improve mediation service. Information is maintained in a confidential manner. Thank you for completing this form. Please mail to:

**Special Education Programs
700 Governors Drive
Pierre, South Dakota 57501-2291**

SAMPLE MEDIATION LETTER

November 10, 1995

Mr. and Mrs. Parent
PO Box 30
Pierre, South Dakota 57501-2291

School District
Superintendent
PO Box 515
Pierre, South Dakota 57501-2291

Dear Parent and Superintendent:

After speaking with each of you about the mediation conference scheduled by mutual consent for November 15, 1995 at 10:00 a.m., I am writing to outline further matters regarding procedures to be followed at the conference:

1. The site of the mediation will be at the Superintendent's Conference Room in Pierre, South Dakota.
2. Ms. Mediator has been selected to mediate the dispute, although if Ms. Mediator cannot attend at the last moment, another qualified and certified mediator will be chosen.
3. Each of you understands the preference for a limited number of participants at the meeting. At this time, the only participants who will be allowed into the session, without prior consent, will be: Mr. and Mrs. Parent, Mr. Hanson, principal; Mr. Jones, superintendent; Ms. Plum, teacher; and Ms. Brown, special education director.
4. Documents may be brought and discussed at the conference. Copies should not be forwarded to me prior to the conference.
5. Tape recording is not allowed. Note taking is discouraged as the purpose of the mediation is settlement, not discovery.
6. Neither the mediator nor the mediator's records or notes will be available for further proceedings such as a due process hearing. Any agreement reached will be reduced to writing and duplicated originals will be given to each of you at the conference.

Special Education Programs
700 Governors Drive
Pierre, South Dakota 57501-2291
Phone 605-773-3678 FAX 605-773-6139 TTY 605-773-6302

Parent/Superintendent Letter

November 10, 1995

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7. Each of you should be aware that the length of the mediation is unknown. Accordingly, I request that you reserve the entire day for the conference.
8. Please note that the mediator is not acting in the capacity of an attorney or advocate for either party during the mediation conference. Rather, the mediator is an impartial neutral. Each of you should understand that the negotiation/mediation process will not prejudice or limit your rights in a formal hearing.

I am available to each of you by phone for discussion of procedure or schedule. However, I will not discuss any of the issues with you before the conference.

I appreciate your willingness to attempt mediation. Be assured that every effort will be expended to help develop a mutually satisfactory agreement which appropriately meets "Johnny's" needs.

Sincerely,

Ann Larsen, Director
Special Education Programs

cc: hearing officer (if part of a due process hearing)
mediator
mediation file